Supreme Court, U.S.
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Supreme Court of the United States

SIEGEL-ROBERT, INC.,
Petitioner,

v.

THOMAS W. SWOPE; JUDY W. SWOPE;
ESTATE OF O. W. SCHNEIDER, JR., TRACY LEIGH SCHNEIDER MORRIS AND O. W. SCHNEIDER, III,
PERSONAL REPRESENTATIVES; ERIC DOUGLAS SCHNEIDER;
MELODY DAWN SCHNEIDER; MARK WILLIAM SCHNEIDER;
TRACY LEIGH SCHNEIDER; AND O. W. SCHNEIDER, III,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

BRYAN CAVE LLP
THOMAS C. WALSH
(Counsel of Record)
ANN K. COVINGTON
ONE METROPOLITAN SQUARE
SUITE 3600
ST. LOUIS, MISSOURI 63102-2750
PHONE: (314) 259-2000
ATTORNEYS FOR PETITIONER

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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QUESTIONS PRESENTED

1. May a federal court in a diversity case refuse to follow squarely controlling decisions of the forum state's highest court on an issue of state law because the federal court deems decisions from other states to be more persuasive or logical?

2. Should this Court resolve confusion among the circuits by requiring federal courts in diversity cases to follow relevant decisions of intermediate state appellate courts on questions of state law, absent intervening statutory changes or disapproval of those decisions by the state's highest court?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Siegel-Robert, Inc., states that it is a privately held corporation with no parent and that no publicly held company owns any of the corporation's stock.

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Petitioner Siegel-Robert, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A) is reported at 243 F.3d 486 (8th Cir. 2001). The Memorandum and Order of the United States District Court for the Eastern District of Missouri (Appendix B, p. A-25) is reported at 74 F.Supp.2d 876 (E.D. Mo. 1999).

JURISDICTION

The opinion and judgment of the Court of Appeals were filed on February 26, 2001. Petitioner's timely Petition for Rehearing En Banc was denied on April 9, 2001 (Appendix C, p. A-132). The jurisdiction of this Court is grounded on 28 U.S.C. § 1254(1). This petition was filed within 90 days of April 9, 2001.

STATUTE INVOLVED

Section 351.455 of the Missouri Revised Statutes is reproduced in Appendix D, p. A-133.

STATEMENT OF THE CASE

Introduction

This case presents important federalism issues under the doctrine of *Erie R.R. Co. v. Tompkins*, 340 U.S. 64 (1938), and its progeny, regarding the circumstances under which a federal court in a diversity case can refuse to following existing, squarely-controlling precedent from both the relevant state supreme court and intermediate appellate courts.

The opinion of the Eighth Circuit dramatically changed Missouri substantive law on the recurring issue of how to value minority interests in corporations. The court, under the guise of "predicting" state law, disregarded existing precedent from the Missouri Supreme Court on one issue and refused to follow directly apposite decisions from the intermediate appellate courts in Missouri on another issue. Instead, it chose to follow decisions from other states (involving different statutes) that it found to be more "persuasive" and more "logical," even though the Missouri courts had never indicated any inclination to overrule their existing decisions.

The Eighth Circuit opinion poses a significant threat to the sovereignty of the state courts, immerses the federal judiciary in the controversial business of making new state law, and conflicts with many decisions of this Court and with those of virtually every other Circuit. This Court's intervention is required to redefine the process by which federal courts identify and apply state law, and to re-establish the appropriate relationship between federal and state courts in this country.

A better opportunity to address these issues may never present itself. The state law disregarded by the Court of Appeals is uniform and has not been criticized or questioned by the Missouri courts; the court's refusal to follow binding precedent was dispositive of the entire case; the case presents an issue of allegiance to decisions of *both* the Supreme Court of Missouri and its intermediate appellate courts; the federal court decision substantially increases the liability of Missouri corporations and produces an absurd result; the stakes are enormous; and the decision below is currently being invoked in pending state-court proceedings against petitioner in an effort to force the state trial court to follow this federal decision instead of adhering to the controlling rulings of the Missouri appellate courts.

Background

In July 1997, petitioner, a Missouri corporation primarily owned by members of the family of the late Bruce G. Robert, decided to restructure so as to take advantage of Subchapter S of the Internal Revenue Code. To facilitate that process and to prevent potentially dissident non-family minority shareholders from jeopardizing the corporation's election or preservation of "S" status, the Board of Directors voted to cash out the 7% minority shareholders by offering them $20 per share for their stock. The stock had originally been purchased for 65% of book value when such minority stockholders or their relatives were employees of the company, and the stock had never been traded publicly or even traded among shareholders.

In recommending the $20 per share figure to the Board, the company's C.E.O., Halvor Anderson, relied, *inter alia,* on his years of experience in valuing companies and on the following factors:

- A late-1996 fair-market appraisal by an independent third party — $17.13 per share.
- The most recent arm's-length transaction in company stock negotiated between the company and a selling shareholder represented by counsel — $19.70 per share.
- Three 1995 purchases aggregating 74,408 shares — $16.25 per share.
- An offer by Respondent Estate of O. W. Schneider to sell just weeks before the merger — $18.00 per share.

Respondents, who owned 443,200 shares, or about 3%, of the outstanding stock, dissented from the merger and asked for valuation of their shares under § 351.455 RSMo., which requires "a finding and determination of the fair value of such shares." They brought this suit in federal court under diversity jurisdiction, 28 U.S.C. § 1332, rather than joining some of their dissenting brethren in state court.[1] The major conceptual disputes at trial related to the appropriateness of discounts for lack of marketability and lack of control and the imposition of a "control premium."

Respondents' expert valued the company at $72.90 per share on a marketable minority interest basis, and then added a 35% "control premium" to produce a per-share value of $98.50 per share. He refused to reduce the value of respondents' stock for its admitted illiquid-

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[1] The state-court proceedings involve another 318,000 Siegel-Robert shares, and the trial judge in the principal state-court case has indicated his intention to follow the ultimate decision of the federal courts.

ity even though a treatise he had authored recognized the "'conventional wisdom' of a norm of about 35 percent" for lack of marketability. His addition of 35% for an "ownership control premium" was based on the presumption that anyone seeking to buy the whole company would need to offer an "inducement" above market value to encourage shareholders to sell. There was, however, no evidence that petitioner had any plans to go public or to sell out. In fact, almost four years after the merger, petitioner remains privately owned by the Robert family.

Petitioner's principal expert concluded that the appropriate valuation on a non-marketable minority basis was $30.00 per share, which represented "fair value" for respondents' shares. He valued the marketable minority interest of respondents' shares at $46.20 per share and rejected a "control premium" as inappropriate because only 3-4% of the company's shares were involved, and overwhelming control already resided in the Robert family. Petitioner's expert testified that a 35% discount for lack of marketability was appropriate because there were (a) infrequent transactions in the stock, (b) no purchases or sales among shareholders, (c) no third-party demand for the stock, (d) no attempts to accumulate shares, and (e) no attempts to sell the company.

The evidence also showed that when the Respondent Estate of O. W. Schneider filed its federal estate tax return in 1997, it valued its Siegel-Robert stock at $18.50 per share.

The District Court Decision

The trial court's opinion (A-25) noted that Missouri law required it to take into account "every relevant fact and circumstance," but the district judge refused to

apply a discount for lack of marketability because of his view that the dissenters' rights statute itself created a "market" for plaintiffs' stock (A-124). That conclusion ignored the statutory requirement that the shares be valued as of the day before the merger, when no such purchase option exists. The district court also rejected respondents' argument for a "control premium" (A-123). In so doing, the trial judge followed the Missouri Court of Appeals decision in *King v. FTJ, Inc.*, 765 S.W.2d 301, 306 (Mo. App. 1988), which had approved a minority discount and which, together with other Missouri cases, had held that the determination of the appropriateness of discounts "rests within the sound discretion of the trier of fact after every relevant fact and circumstance is considered" (A-107).

The district court then summarily concluded — without any explanation or elaboration — that the "fair value" of plaintiffs' shares on a marketable minority basis was $63.36 per share, or about $30,000,000 in the aggregate (A-125). Both parties appealed.

While the main appeals were pending, the Internal Revenue Service produced a valuation of the *majority* block of Siegel-Robert shares owned by founder Bruce Robert at the time of his death in late 1996. That appraisal, done by an independent valuation firm retained by the IRS, exposed some serious flaws in respondents' expert's methodology, applied a discount for lack of marketability, and valued the *majority* interest in the company at $45.69 per share. Petitioner filed a Rule 60(b) motion asking the district court to consider this newly discovered evidence. The court summarily refused without explanation. Petitioner filed a notice of appeal, which was consolidated in the Eighth Circuit with the main appeals.

The Court of Appeals' Opinion

The Eighth Circuit, in an opinion by Judge Theodore McMillian, affirmed on petitioner's appeals and reversed on respondents' cross-appeal. Ignoring the controlling opinion of the Missouri Supreme Court in *Phelps v. Watson-Stillman Co.*, 293 S.W.2d 429, 433 (Mo. 1956), that "fair value" and "fair market value" "have the same general meaning," and that the court should consider "every relevant fact and circumstance which enters into the value of corporate property and reflects itself in the worth of corporate stock," the appellate panel ruled that any evidence that these same minority shares had a fair market value of $18.50 or that the majority shares had a fair market value of $45.69 for estate tax purposes was completely irrelevant to the determination of "fair value" (A-14, A-24). The court did not even mention the fact that the Missouri Supreme Court and the Missouri Court of Appeals had both upheld marketability and minority discounts in determining the "fair market value" of closely-held stock in the domestic relations context.

Instead, the court relied on cases from New Jersey, Delaware, Maine, and South Dakota in refusing to consider the "fact and circumstance" that the stock was illiquid, and held that lack of marketability did not affect its value. The district court's erroneous creation of a fictional "market" by reason of the dissenters' rights statute was not discussed.

Even though the Missouri Court of Appeals had expressly approved and applied a minority discount under § 351.455 in *King*, the Eighth Circuit refused to follow that decision but, based on rulings from other states, held as a matter of law that plaintiffs were

entitled to a "control premium" — although it did not discuss the issue in those terms. It spoke only of disallowing a "minority discount," thus obscuring the fact that its holding requires the going concern value of the company to be enhanced by an unspecified percentage as if it were to be sold tomorrow to a third party at a premium over market value. The minority shares have thus been awarded a premium that is not available to the majority.

The Eighth Circuit also held that the district court was not required to give any consideration to the independent appraisal commissioned by the IRS which valued the *majority* block of Siegel-Robert stock at $45.69 per share (A-24). In the process, the Court erroneously characterized that block as a "minority" and criticized defendants for failing "to procure this estate tax appraisal before trial." (A-23). The IRS appraisal was not available at the time of trial and was beyond defendant's control — which is precisely why it was uniquely probative. Because of these mistakes, the Court apparently was unaware or unconcerned that its opinion ordered a valuation of a minuscule block of *minority* stock that would probably exceed the impartial valuation of the *majority* block by at least 50%.

Respondent's Petition for Rehearing En Banc was denied (A-132).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' REFUSAL TO APPLY THE CONTROLLING MISSOURI SUPREME COURT DECISIONS IN *PHELPS* AND *HOFFMAN* VIOLATES THE *ERIE* DOCTRINE, CONFLICTS WITH DECISIONS OF THIS COURT AND NUMEROUS CIRCUITS, AND SETS AN UNWISE PRECEDENT THAT WILL ENCOURAGE FEDERAL JUDGES TO REWRITE STATE LAW WITH WHICH THEY DISAGREE.

The Court of Appeals in this case held (a) that fair market value was irrelevant to an determination of fair value under § 351.455 RSMo., and (b) that discounts for lack of marketability and for minority status are prohibited as a matter of law in Missouri. Hence, a trial court has no discretion to take into account the illiquid nature of stock and must apply a "control premium" to even the smallest block of minority shares. The court therefore refused to consider the facts that (1) respondents valued their own stock — the very same shares involved in this case — at a fair market value of $18.50 per share in their federal estate tax return, and (2) the IRS valued the *majority* block owned by the estate of the company's founder at $45.69. The district court was thus ordered to increase its already excessive valuation to some figure greater than $63.36.

In reaching this astonishing conclusion, the Eighth Circuit disregarded the squarely controlling ruling of the Missouri Supreme Court in *Phelps v. Watson-Stillman Co.*, 293 S.W.2d 429, 433 (Mo. 1956), where that court held that in dissenters' rights statutes "... the terms 'value,' 'fair value,' 'fair cash value,' and 'fair

market value'. . . have the same general meaning . . . ." The *Phelps* court also emphasized that the trial court should consider every relevant fact and circumstance which enters into the value of corporate property and which reflects itself in the worth of corporate stock. *Id.* at 433. It is therefore simply not true in Missouri that lack of marketability and fair market valuations must be totally ignored in determining "fair value"; yet the Eighth Circuit so held.

Moreover, in *Hoffman v. Hoffman*, 676 S.W.2d 817, 826 (Mo. banc 1984), the Supreme Court in determining fair market value in a divorce case, upheld a 45% discount for a 29.5% interest in a close corporation because of its minority status and lack of marketability. The Eighth Circuit did not mention *Hoffman*, presumably because it involved the supposedly "irrelevant" concept of fair market value.

Instead of following these cases as required, the Eighth Circuit resorted to non-Missouri sources to hold that, "Contrary to the Company's contention 'fair value' in minority stock appraisal cases is not equivalent to 'fair market value'" (A-11), and that "the market for minority stock in a dissenting shareholders' appraisal proceeding, absent extraordinary circumstances, is not a relevant fact or circumstance to consider when determining fair value" (A-14). In support of its reasoning, the Eighth Circuit cited several law review articles, cases from other states, the American Law Institute, and an unappealed federal district court decision from the Eastern District of Missouri (A-9 — A-12).

Simply stated, the Eighth Circuit rewrote Missouri law and effectively overruled *Phelps*, apparently because it considered it to be out of step with emerging

thinking. The federal court had no authority to do so. In *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941), this Court noted that the proper function of a federal court in a diversity case "is to ascertain what the state law is, not what it ought to be." *See also Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (neither the Supreme Court nor any other federal court has the authority to ignore the construction of a state statute rendered by a state's highest court, whether the state rule is substantive or procedural).

The approach taken by the Eighth Circuit not only disregards the dispositive rulings of this Court but conflicts with the virtually unanimous view of other Circuits. *See, e.g., Quint v. A. E. Staley Mfg. Co.*, 172 F.3d 1, 17 (1st Cir. 1999) (absent conspicuous evidence that a state's highest court has abandoned a previously announced rule, the federal courts should follow it); *Barfield v. Madison County, Miss.*, 212 F.3d 269, 271-72 (5th Cir. 2000) (when state law provides the rule of decision, federal court is bound to apply the law as interpreted by the state's highest court). It is not the role of federal courts to question the policy choices of the states whose law they apply. *Jordan v. Hawkers Dayton Corp.*, 62 F.3d 29, 32 (1st Cir. 1995); *Krauss v. Manhattan Life Ins. Co.*, 643 F.2d 98, 102 (2d Cir. 1981). The constraints on this kind of activism were recently well stated in *A-G Services of America, Inc. v. Nielsen*, 231 F.3d 726, 735-36 (10th Cir. 2000):

> "We do not believe that it is our position to predict that the New Mexico Supreme Court would overrule its precedent in the complete absence of any indication *from that court* of its inclination to do so."

If respondents had filed this case in Missouri state court, the trial court and the intermediate appellate court would have been required to follow *Phelps* and *Hoffman* by taking the market value into account in determining fair value. Respondents then could have asked the Missouri Supreme Court to overrule its existing precedent, but most likely would have been unsuccessful. See *Crabtree v. Bigby*, 967 S.W.2d 66, 71-72 (Mo. banc 1998) (Supreme Court "should not lightly disturb its own precedent. Mere disagreement by the current court with the statutory analysis of a predecessor court is not a satisfactory basis for violating the doctrine of stare decisis, at least in the absence of recurring injustice or absurd results."). Regardless, the Eighth Circuit most certainly does not have the power to overrule decisions of the highest court of any state or to blaze new state-law trails. *Martel v. Stafford*, 992 F.2d 1244, 1247 (1st Cir. 1993) (plaintiff who selects a federal forum in preference to available state forum "may not expect the federal court to steer state law into unprecedented configurations"); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993) (plaintiff who wants to argue for change in well-settled state law should have filed in state, not federal, court).

The result below violates the federalism principle recognized in *Erie* and recently applied in *Semtek Int'l, Inc. v. Lockheed-Martin Corp.*, 121 S.Ct. 1021, 1028 (2001), that the result of a case should not differ depending on whether it is adjudicated in state or federal court. The decision below creates an ominous precedent, encourages forum shopping, and will be viewed as permitting federal judges to ignore state supreme court decisions they don't like. This Court should grant review to

reinforce the sovereignty of the highest courts of the several states on matters of state law.[2]

II. THE COURT OF APPEALS' REFUSAL TO FOLLOW THE INTERMEDIATE MISSOURI APPELLATE COURT DECISIONS IN *KING* AND *STEIN*, BASED ON A "PREDICTION" THAT THE MISSOURI SUPREME COURT WOULD REJECT THOSE DECISIONS IN FAVOR OF PRECEDENT FROM OTHER STATES DEEMED TO BE MORE "PERSUASIVE" OR "LOGICAL," RAISES SERIOUS ISSUES UNDER *ERIE* THAT REQUIRE CLARIFICATION BY THIS COURT.

Besides ignoring the decisions from the Missouri Supreme Court discussed above, the Eighth Circuit also refused to follow intermediate appellate court decisions directly on point. In *King v. FTJ, Inc.*, 765 S.W.2d 301 (Mo. App. 1989), the Missouri Court of Appeals specifically recognized the discretion reposed in the trial judge to impose discounts for lack of marketability and for minority status under § 351.455. The *King* court upheld a minority discount because it "reflects that the seller of a minority stock interest has no controlling voice in corporate affairs. Therefore, the minority nature of the interest may be said to diminish the worth of the stock itself." *Id.* at 305. *King* not only reiterated the above-

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[2] In perhaps the ultimate irony, the Eighth Circuit's decision is presently being invoked against Siegel-Robert by other dissenting shareholders who sued in state court and who are arguing that the state court is bound to apply this "new" Missouri law on the basis of collateral estoppel. If that effort were to succeed, *Erie* would be turned completely upside down.

quoted language from *Phelps* equating fair value to fair market value, but also cited the fair-market-value decision in *Hoffman* in support of its analysis of "fair value." The Missouri Supreme Court denied an application for discretionary review in *King*.

Additionally, in *Stein v. Stein*, 781 S.W.2d 87 (Mo. App. 1990), the Court of Appeals refused to award a control premium even as to shares of stock of a closely-held corporation which actually pushed the owner over the 50% mark — that is, the shares which actually gave him control.

The Eighth Circuit, in reversing the trial court's application of a minority discount as to this 3% block of stock, rejected *King*, ignored *Stein*, and held that as a matter of law in Missouri any block of shares owned by dissenters is entitled to a "control premium." In other words, dissenters' stock is to be valued as if a third party were offering to buy the entire company at a premium. Because the Missouri Supreme Court had never addressed the issue of minority discounts in the context of dissenters' rights (*but see Hoffman* in the domestic context), the Eighth Circuit considered itself "not bound by Missouri's intermediate appellate court decisions because we are 'convinced by other persuasive data that the highest court of the state would decide otherwise'" (A-19).

The "other persuasive data" relied on by the Court were not derived from anything contained in any opinion of any Missouri court, but were decisions from other states which the Eighth Circuit panel found more "persuasive" and possessed of more "logic" than the Missouri cases (A-19). Even though (a) Missouri's dissenters' rights statute was patterned after Illinois' scheme, (b)

Missouri had expressly refused to adopt a Delaware-type statute, and (c) the Missouri Supreme Court in *Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245, 259 (Mo. 1968), said that decisions of Delaware courts were "not persuasive" in interpreting the Missouri statutes, the Eighth Circuit nevertheless said, "specifically, we find Delaware's decisions on this matter persuasive. . ." and refused to follow two Illinois decisions that had squarely upheld both minority and marketability discounts. *Stanton v. Republic Bank of South Chicago*, 581 N.E.2d 678, 682 (Ill. 1991); *Weigel Broadcasting Co. v. Smith*, 682 N.E.2d 745, 750-51 (Ill. App.) (1996). *See* A-20 n.3.

This Court in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940), and again in *Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988), emphasized that a decision of an intermediate appellate court is "a datum that is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." The *West* court also warned that a suggestion that a state supreme court would disagree with the intermediate court is "a matter of conjecture" — the antithesis of "persuasive data." *West*, 311 U.S. at 238.[3] Most circuits have required "other persuasive data" to be some convincing indication from the state high court itself that it disagrees with the intermediate court. *See e.g.*, *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 775 (11th Cir. 2000); *Kutsugeras v. AVCO Corp.*, 973 F.2d 1341, 1346 (7th Cir. 1992); *Green v. Walker*, 910 F.2d 291, 295-96 (5th

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[3] *West* also observed that where the state supreme court denies review (as occurred in *King*), the force of the appellate court decision is strengthened. *West*, 311 U.S. at 237.

Cir. 1990); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1485 (6th Cir. 1989); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir. 1986).

Professor Moore, as if he were writing about this case, warns of the limitations on federal courts in this context:

> "... [A] federal court may not ignore an intermediate court decision because it believes the decision is wrong, bad policy, contrary to the majority rule in other states, lacking common sense, or not what it 'ought to be.'" *Moore's Federal Practice* § 124.20[2], p. 124-76.

See also Assicurazioni Generali, S.p.A. v. Neil, 160 F.3d 997, 1003 (4th Cir. 1998) (federal court may not refuse to follow intermediate state court decision "simply because the federal court believes the decision was wrong, bad policy or contrary to the majority rule in other jurisdictions").[4]

It is risky enough to allow federal courts to "predict" state law when there are no state court decisions on the subject. It is something else, though, to accord a federal court the latitude to overrule decisions by state appellate judges by means of "predictions" based on the amorphous and undefined concept of "persuasive data." If the notion of "persuasive data" is to be preserved, it should be confined to tangible, articulated data derived

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[4] In contrast, because of the leeway perceived in the present rule, the federal courts in the following cases refused to follow intermediate state appellate court decisions that they considered to be incorrectly decided: *United States v. Johnson*, 160 F.3d 1061, 1063-66 (5th Cir. 1998); *Weber v. GAF Corp.*, 15 F.3d 35, 36-37 (3d Cir. 1994).

from the state's own judiciary, not policy considerations imported from elsewhere. Although this Court has never defined the type of data that might properly be deemed "persuasive," *Moore's Federal Practice* § 124.20[2], pp. 124-74-76, urges that this inquiry should be internal to the state by listing "persuasive grounds" that *might* justify a federal court in refusing to follow an intermediate state decision:

- Subsequent statutory enactments or amendments that change state law.
- Decisions of the state's highest court in analogous or related areas that suggest that the highest court would decide the issue differently.
- A statute or statutory scheme with which the decision conflicts.
- Considered dicta of the state's highest court that contradicts lower court decisions.
- Differences between state circuit or district courts.

None of these circumstances even arguably exist here. There is no indication anywhere in Missouri law that the state is unhappy with its dissenters' rights jurisprudence. Nor is there any basis for concluding that valuation of minority stock should proceed differently in a dissenters' rights case than in a domestic relations context.

As a matter of policy, why shouldn't appellate court decisions be considered "the law" of the state for *Erie* purposes? In contrast to the situation that prevailed 30 years ago when *West* was decided, the intermediate

appellate courts in most states are now effectively the courts of last resort for 80-90% of the cases. Their decisions are "state law" that is binding on their litigants, trial courts, and other panels of the same appellate court. Those decisions are written, announced, and published by judges trained in the state's jurisprudence and familiar with its customs, rules, and mores. Why should a panel of federal judges, at least two of whom are almost certain to be from out of state, not be bound by that "state law" as announced by those state appellate judges?

Under the circumstances, the Eighth Circuit exceeded its authority by changing Missouri law and, in the process, substantially expanding the liability of corporations engaged in perfectly legal statutory mergers. This Court should grant certiorari to clarify the deference owed in diversity cases to the judicial pronouncements of state appellate court judges.

* * *

In *Erie*, 304 U.S. at 79, Justice Brandeis' opinion for the Court noted that the Constitution recognizes and preserves the autonomy and independence of the states and quoted Justice Field as to the need for federal courts to refrain from intermeddling in matters of state law:

"'Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'" *Id.* at 79, quoting *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

The opinion below is inconsistent with these teachings and with the decisions of this Court properly requiring state law to be followed, not rewritten. The Eighth Circuit has undermined *both* of the "twin aims" of *Erie*, as enumerated in *Hanna v. Plummer*, 380 U.S. 460, 468 (1965): "discouragement of forum-shopping and avoidance of inequitable administration of the laws." This Court should grant review to reinforce the principles of federalism that have been eroded by the Court of Appeals and to give guidance to the federal judiciary concerning the proper method of ascertaining applicable state law. It should also disavow the message sent by the court below that state court decisions can be ignored with impunity merely because they are perceived to be out of the emerging jurisprudential mainstream or because decisions from elsewhere are deemed more persuasive or logical.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRYAN CAVE LLP
Thomas C. Walsh (Counsel of Record)
Ann K. Covington
One Metropolitan Square
Suite 3600
St. Louis, MO 63102-2750
(314) 259-2000
Attorneys for Petitioner

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